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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 880.

October Term, 1945.

HARRY J. ALKER, JR., and MAMIE DuBAN, Individually, and as Executrix of the ESTATE OF ALFRED A. DuBAN, Deceased,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION.

Petition for Rehearing.

EDWIN HALL, II,
A. D. BRUCE,
HARRY J. ALKER, JR.,
1505 Land Title Building,
Philadelphia, Pa.,
ALLEN J. LEVIN,
DAVID BORTIN,
STANLEY FOLZ,
Bankers Securities Building,
Philadelphia, Pa.,
L. A. SPIESS,
Washington, D. C.,
Counsel for Petitioners.

International, 236 Chestnut St., Phila. 6, Pa.

IN THE

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HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION.

PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, Harry J Alker, Jr., and Mamie DuBan, individually, and as Executrix of the will of Alfred A. DuBan, deceased, pray that this Court rehear and reconsider its denial of the petitioners' petition for the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in the above entitled case.

On February 23, 1946, your petitioners filed with your Honorable Court a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit in the above matter.

The Respondent filed its brief with your Honorable Court on March 19, 1946.

Your petitioners filed their reply brief with your Honorable Court on Friday, March 29, 1946.

On Monday, April 1, 1946, your Honorable Court refused the certiorari.

The history of the case, the questions presented, the statutes and law involved, the specifications of errors and the reasons for granting the writ are all set forth in the petition for certiorari and brief in support thereof, to which reference is made and will not be repeated here.

Grounds for Granting the Petition.

1. Your petitioners feel that a serious error has been made by your Honorable Court in refusing the certiorari and submit that the United States Circuit Court of Appeals for the Third Circuit has decided an important federal question of substance in conflict with the applicable decisions of the Supreme Court of the United States, the Circuit Court basing its decision in the present case on the case of Federal Deposit Insurance Corporation v. D'Oench, Duhme Co., 315 U. S. 447, which your petitioners submit was never intended by your Honorable Court to apply to a case like the present one.

2. *In the D'Oench, Duhme case there was an attempt to avoid liability. In our case there is no attempt to avoid liability. There is no claim that under the agreement in this case Alker was not to be liable on the note at all. It was merely an agreement defining the time of payment of the demand note unless default in the terms of the agreement took place in the meantime.* No default has taken place to date in accordance with the terms of the agreement. The time for payment has not yet arrived, to wit; the date of the expiration of the insurance policies in the fall of 1946. None of the cases cited by Respondent are cases involving agreements deferring payment of the note, nor are they cases in which valuable consideration as here passed for the agreement. They are all cases where there was a definite effort to make assets of a bank appear of greater value than they actually were and thus deceive the bank examiner as to the true condition of the bank.

3. The basis of the D'Oench, Duhme case is a federal policy to protect Federal Deposit Insurance Corporation and the public funds which it administers against misrepresentation as to the securities or other assets in the portfolios of banks which Federal Deposit Insurance Corporation insures or to which it makes loans, 315 U. S. 447, 457. It is the "evil tendency" of the acts to contravene the policy governing banking transactions which lies at the root of the rule 315 U. S. 447, 459. The Court in so ruling relied on 7 Zollman, Banks & Banking (1936) SS 4783. That section deals with cases where the officers of a bank tried by a secret agreement to conceal or misrepresent the true condition of assets of the bank in order to obtain insurance of deposits from Federal Deposit Insurance Corporation.

But those are not the facts of this case. The identical assets with one exception were with the Integrity Trust Company, the insured state bank, at the time the Federal Deposit Insurance Corporation insured the said state bank, as were there when these assets were taken over by the Federal Deposit Insurance Corporation in 1940. The only change was that petitioner executed a new note in 1936 to replace the original two notes. The new note on its face clearly recited that it was "*in extension of and substitution for the previous notes,*" which notation all the bank witnesses testified was notice to everyone of a special agreement attached to the note. In fact, if anything, between 1936 and 1940 the condition of the assets had improved due to the increase in market value of the securities. There is no evidence in the record that the petitioner or the state bank officials made any misrepresentation of the securities pledged for this loan, their genuineness or integrity. The evidence further shows that in connection with the assignment of fees, some of which were due from the Commonwealth of Pennsylvania and some from individuals, all of the said fees as received were paid by the petitioner to the Trust Company and then to the Respondent, except one

which has not as yet been received. Therefore, *there was no evil tendency prevalent that might contravene the policy governing banking transactions.* Hence, to base the decision in this case on the D'Oench, Duhme case is a great misapplication of that principle of that case and will cause great injustice.

The misapplication of the D'Oench, Duhme case to this case is further evidenced by the statement of the Circuit Court of Appeals in its opinion that "We will assume further there was a valid oral contract to this effect, and that Alker and DuBan did everything that was required of them by this contract." Record, page 558. The Circuit Court not only assumed there was an oral contract in this case, but even assumed that it was a valid one. In spite of this assumption the Circuit Court then ruled the contract was invalid, because it came within the D'Oench, Duhme case, which was a clear case of fraud, and an attempt to avoid liability by what was a secret agreement. The Circuit Court of Appeals so ruled in spite of the express finding by the Chancellor that there was no fraud in this case. (Record Pp. 475a, 502a.)

4. In the present case there was no evidence of any request by Alker or DuBan that the transaction be not recorded among the records of the bank or knowledge on their part that same had not been recorded. The evidence shows to the contrary that there was such a record—both on the note itself and by action of the Executive Committee on several occasions.

5. The D'Oench, Duhme case furthermore was a case in which there was actual fraud and intent to deceive the Bank Examiner, whereas in our case there was a distinct finding by the District Court that there was no fraud, nor was there any deception or intention to deceive; the agreement having been openly made for the benefit of both the bank and the petitioners. In the D'Oench, Duhme case there was no way by which the Bank Examiner or the Fed-

eral Deposit Insurance Corporation could have learned the true facts.

In this case the president of the bank testified (record page 273a) that he himself discussed the matter with the Bank Examiner; the note in this case itself had specifically endorsed thereon a notation which indicated to all persons, including the Bank Examiner, that there was an agreement relating to the note, the Federal Deposit Insurance Corporation having recognized from the start that there was an agreement—they having checked up with Alker and Fischer, an important director and member of the Executive Committee of the Trust Company, as to the same, and, after checking up, continued to recognize it and conformed with its terms for over two years.

While in their brief (page 5) the Federal Deposit Insurance Corporation says it made clear to Alker that it did not recognize the agreement, Alker denies this and there is no evidence anywhere in the record that they advised Alker that they did not recognize it, but the record shows they did unconditionally recognize it and continued to accept the benefits conferred by the agreement for more than two years before it attempted to repudiate it. Furthermore, the record shows that the agreement was before the Executive Committee of the Trust Company a number of times, and by it was recognized as a binding and valid agreement.

6. The evidence shows that Mr. William P. Gest (who was president of one of the largest banking institutions in Philadelphia and a member of the Executive Committee of the Integrity Trust Company) stated at the Executive Committee meeting that inasmuch as they had made the agreement with Alker and Alker was living up to it, the Integrity must live up to its part. (Record pages 250a and 251a.)

7. If the decision here is allowed to stand, it will impose upon *every borrower from or customer of a bank* the

impossible duty of seeing that the records of the bank show his transaction with the bank. *A borrower or customer should not be penalized because of the failure of the institution's records, without his knowledge, to satisfactorily show his transaction with it, where the transaction is clean and above reproach.*

Here, however, not only was the present case clean and above reproach, but there was such a notation on the note itself that *even the bankers testifying as witnesses for the Respondent* admitted the special notation indicated that there was some agreement connected with the note, and the Bank Examiner and the Federal Deposit Insurance Corporation were both therefore on notice. Besides, the president of the institution testified he discussed it with the Bank Examiner.

8. In this proceeding the Federal Deposit Insurance Corporation elected to go into the equitable side of the Court. Your petitioners submit it should not be allowed to accept the benefits of the agreement for over two years, and then suddenly abandon such course and reverse its position when there was no default and retain both the benefits and the property belonging to others that was deposited on the strength of the agreement which it had recognized so long.

9. In the D'Oench, Duhme case the Federal Deposit Insurance Corporation did not know of any agreement existing until they made demand for payment. In this case the Respondent knew about the agreement existing before it took over the note. The Federal Deposit Insurance Corporation never stated that it was not bound by it, but on the contrary proceeded to carry on in the same manner for two years and more as had the Trust Company.

During all the period—about five years—that the Respondent insured the Trust Company, the Respondent had plenty of opportunity to inspect the assets and fully apprise itself of their condition.

Conclusion.

For the foregoing reasons it is urged that a rehearing be granted and the order denying the petitioners' petition for a writ of certiorari be reconsidered.

The undersigned, the counsel of record for the petitioners, certify that this petition for a rehearing is presented in good faith and not for the purposes of delay.

Respectfully submitted,

EDWIN HALL, II,
A. D. BRUCE,
HARRY J. ALKER, JR.,
1505 Land Title Bldg.,
Phila., Pa.
ALLEN J. LEVIN,
DAVID BORTIN,
STANLEY FOLZ,
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Phila., Pa.
L. A. SPIESS,
Washington, D. C.,
Counsel for Petitioners.

(16)

IN THE

Supreme Court of the United States

No. 850.

October Term, 1945.

HARRY J. ALKER, JR., and MARIE DuBAN, Individually, and as Executrix of the ESTATE OF ALFRED A. DuBAN, Deceased,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION.

PETITION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING AND SECOND PETITION FOR REHEARING.

EDWIN HALL, II,
A. D. BRUCE,
HARRY J. ALKER, JR.,
1301 Land Title Building,
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Bankers Securities Building,
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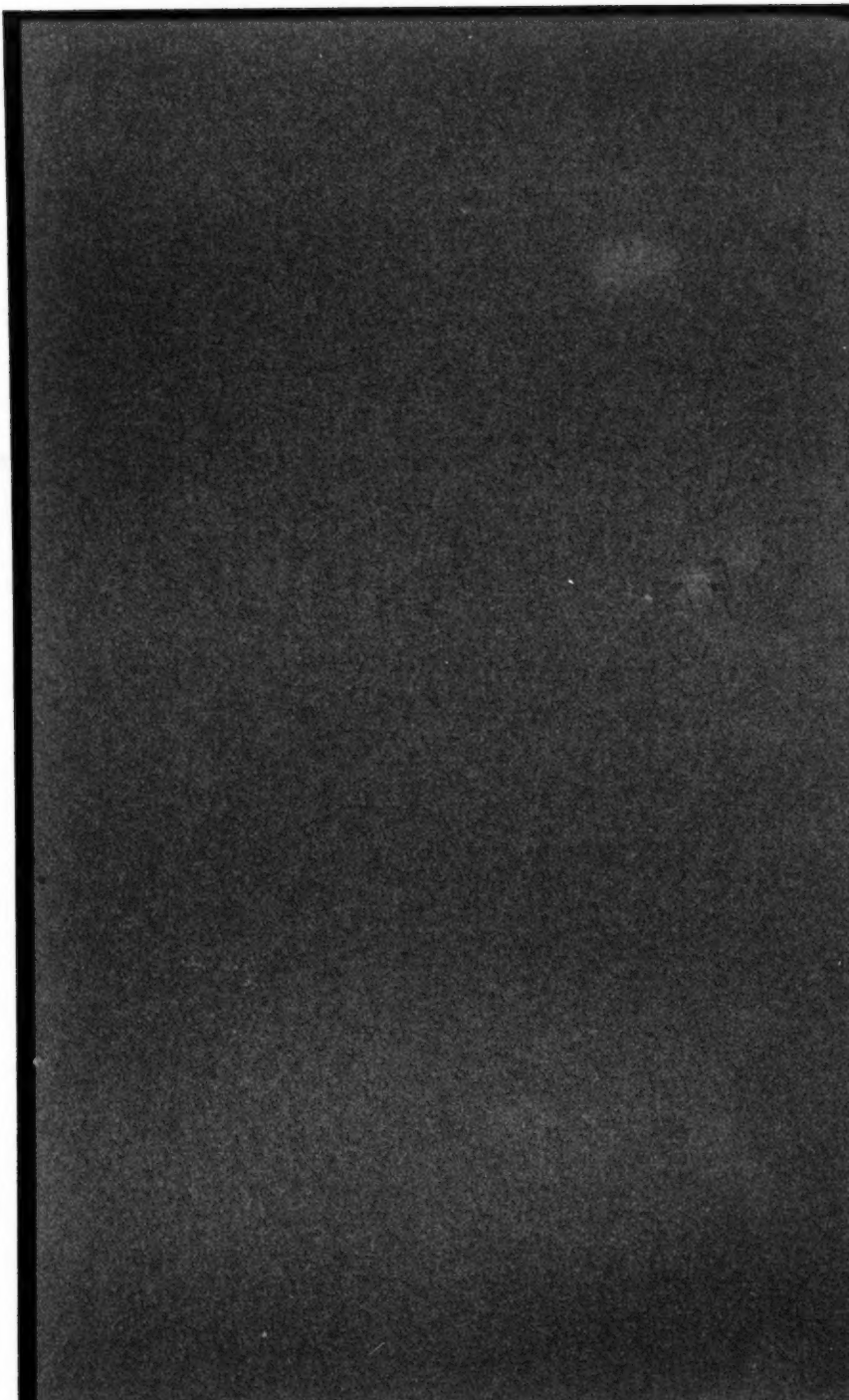

IN THE

Supreme Court of the United States.

No. 880.

October Term, 1945.

HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION.

PETITION FOR LEAVE TO FILE SECOND PETITION FOR RE-HEARING.

To the Honorable the Acting Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, HARRY J. ALKER, JR., and MAMIE DUBAN, individually and as Executrix of the will of Alfred A. DuBan, deceased, pray leave to file a second petition for rehearing and reconsideration of petitioners' petition for the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in the above entitled case.

The first petition for re-hearing was filed on Monday, April 22, 1946, the day of Chief Justice Stone's sudden unfortunate death. It was refused on the following Monday, April 29, 1946.

Your petitioners submit that the week of April 22nd was a very distressing week to your Honorable Court and one in which your Honorable Court could not be other than very much upset.

The matter here is one involving a federal policy. There has been a gross misapplication to this present case of the decision of your Honorable Court in the case of *Federal Deposit Insurance Corporation v. D'Oench, Duhme & Co.*, 315 U. S. 447; grave inequity has been done; your petitioners will suffer irreparable damage; and great confusion will result generally if the decision is allowed to stand.

Your petitioners therefore have prepared a second petition for re-hearing of their petition for certiorari and beg leave to file the same.

Respectfully submitted,

Edwin Hall, II,
A. D. Bruce,
Harry J. Alker, Jr.,
1505 Land Title Bldg.,
Phila., Pa.
Allen J. Levin,
David Bortin,
Stanley Folz,
Bankers Securities Bldg.,
Phila., Pa.
L. A. Spiess,
Washington, D. C.,
Conusel for Petitioners.

ORDER.

AND NOW, , 1946, leave is granted the petitioners to file a second petition for re-hearing of the petitioners' petition for the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in the above entitled case.

BY THE COURT,

.....

J.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 880.

October Term, 1945.

Harry J. Alker, Jr., and Mamie DuBan, Individually, and as Executrix of the Estate of Alfred A. DuBan, Deceased,

v.

Federal Deposit Insurance Corporation.

SECOND PETITION FOR RE-HEARING.

To the Honorable the Acting Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Harry J. Alker, Jr., and Mamie DuBan, individually, and as Executrix of the will of Alfred A. DuBan, deceased, again pray that this Court re-hear and reconsider its denial of the petitioners' petition for the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in the above matter.

Your petitioners filed with your Honorable Court on April 22, 1946—the day of Chief Justice Stone's sudden death—their petition that your Honorable Court reconsider its action in refusing your petitioners a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in the above matter.

The said petition for re-hearing was refused on April 29, 1946.

At the time of the presentation of the said petition there was not a full court—Mr. Justice Jackson being absent in Europe and Chief Justice Stone having been suddenly taken ill and dying subsequently.

The week of April 22, 1946, was a week of calamity and grief to this Honorable Court. Because of the same and the possible effect it had on the remaining members of the Court, your petitioners feel that they should request a rehearing.

The matter is one of public policy and great public interest because the question here is not only one that affects your petitioners seriously but also practicallly all the banks and banking institutions of the United States—they being insured by the Federal Deposit Insurance Corporation—and the public doing business therewith.

The refusal of the certiorari in this case leaves the banking world in doubt as to just how far this Honorable Court intended its important decision in *Federal Deposit Insurance Corporation v. D'Oench, Duhme & Co.*, 315 U. S. —447, to apply, that being the case relied upon by the Circuit Court as the basis for its decision in the present case. For this reason your petitioners submit the matter should only be disposed of after oral argument and action by the full court.

In the said case of *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, your Honorable Court on page 457 ruled that there was a federal policy to protect the Federal Deposit Insurance Corporation and the public funds which it administers against misrepresentations and the securities and other assets in the portfolios of the banks which the Federal Deposit Insurance Corporation insured or to which it makes loans; and on page 459 ruled that "there was a federal policy to protect the Federal Deposit Insurance Corporation from misrepresentations made to induce or influence the action of the Federal Deposit Insurance Corporation including mis-statements as to the genuineness or integrity of securities in the portfolios of banks which it insured or to which it makes loans." Having found that there was such a federal policy it proceeded to decide the *D'Oench, Duhme* case.

The Circuit Court of Appeals for the Third Circuit based the decision in the present case on the Court's finding

in the aforesaid *D'Oench, Duhme* case, thus *deciding that there was a federal policy present in this case and one over which the Supreme Court would have jurisdiction.*

In our case, however, petitioners contend the Circuit Court of Appeals for the Third Circuit misinterpreted and misapplied the decision in the *D'Oench, Duhme* case, causing confusion aforesaid as to just what the Supreme Court meant by the *D'Oench, Duhme* decision.

In the present case there was no misrepresentation as to the securities or other assets in the portfolios of the trust company. Furthermore, there was no mis-statement as to the genuineness or integrity of securities in the portfolios of the trust company. The identical securities were on deposit as collateral for this loan at the time the Federal Deposit Insurance Corporation took over the assets as were on deposit when the agreement was made with the trust company, except Alker had signed a new note and the trust company had arranged for new insurance policies which did not expire until 1946. All of these assets had been examined by the Bank Examiner many times since 1931. The stocks and bonds with the loan were marketable securities (mostly in national corporations which had large deposits with the trust company and with whose intrinsic worth both the trust company and the Federal Deposit Insurance Corporation were familiar) the assignment of fees was good and binding on the assignor, large sums were collected thereon, the policies of insurance expiring in the latter part of 1946 were properly assigned and maintained in force, and the interest was paid. The note itself had an endorsement thereon which was notice of the agreement. *The agreement operated to the very substantial advantage of the trust company. There was nothing of an evil tendency therefore in this case that could possibly contravene the federal policy referred to by the Court in the O'Oench, Duhme case.*

The Circuit Court of Appeals for the Third Circuit decided this case in favor of the Federal Deposit Insurance

Corporation because it was of the opinion that the agreement in question was a "secret" agreement. The District Court found, however, there was no fraud and did not find there was any secret agreement. Instead of showing a secret agreement the record shows that the agreement in question was discussed by the president of the trust company with the Bank Examiner; that the instrument itself had a notation on it that was notice to the Bank Examiner and the Federal Deposit Insurance Corporation that there was an agreement; that the Federal Deposit Insurance Corporation clearly knew of the agreement when it took over the note and collateral; that for over two years thereafter it accepted the benefits of the agreement with full knowledge of the agreement and then suddenly attempted to repudiate it. The record clearly shows that the agreement was known to the president, the vice-president, the Executive Board of the trust company, the Federal Deposit Insurance Corporation and the Bank Examiner, and that even the clerks in the loan department knew there was an agreement in connection with the loan, all as stated in the petition for certiorari and the first petition for re-hearing, to which reference is made; the averments therein set forth being made a part hereof by reference and will not be repeated here.

The Circuit Court of Appeals for the Third Circuit based its decision entirely on the *D'Oench, Duhme* case which was a case in which the bank and the maker of the note conspired to deceive the Bank Examiner, and the Federal Deposit Insurance Corporation knew nothing about the agreement until it brought suit on the note itself. *It was a case in which there was a clear mis-statement as to the genuineness of the security and a clear intention to deceive.*

No such situation exists here. In the present case the Federal Deposit Insurance Corporation was familiar with the agreement at the time it took the assets over; made no demand for payment for over two years, and during that

period billed Alker and accepted interest at 5% and the benefit of the insurance—all the interest and premiums having been paid up to the date of the alleged sale. In fact, the interest has been tendered by Alker regularly to the Federal Deposit Insurance Corporation to date, and all annual insurance premiums (which run into substantial sums) paid by Alker to date on the $125,000. insurance on the life of Alker payable to the Federal Deposit Insurance Corporation and held by the Federal Deposit Insurance Corporation as collateral with the loan. The Respondent at the trial admitted there was no default in any of these items.

Your petitioners submit your Honorable Court in deciding the D'Oench, Duhme case never intended it to apply to a case like the present one, and this decision should not be allowed to stand. If it is, it will place the burden upon every customer of a banking institution making any agreement therewith, however beneficial to may be to the banking institution, to see that the bank itself (*over which the customer has no control*) makes such a record on its own books that will clearly bring the same to the attention of the Bank Examiner and the Federal Deposit Insurance Corporation. This is impossible in practice as the customer has no access to or control over the records of the bank, and it will greatly impede the banking business and cause great confusion in the banking world if each customer is obliged, in order to protect himself, to communicate directly with the Department of Bank Examiners and the Federal Deposit Insurance Corporation about his transaction.

Surely your Honorable Court had no such intention in mind when it decided the D'Oench, Duhme case, but on the contrary it only intended the same should apply to a case of misrepresentation, fraud or deceit, which does not exist in the present case.

A very important difference between this case and the D'Oench, Duhme case is this: It was the intention in the

D'Oench, Duhme case to evade liability on the note. Here there was no such intention. The agreement in this case was only made to define the maturity of the note; not to avoid or evade any liability on the note. Petitioner Alker here admits liability but that under the agreement the indebtedness does not mature until the end of the ten-year term insurance policy in 1946.

The Federal Deposit Insurance Corporation here has appealed to the equitable side of the Court as it not only seeks a deficiency against Alker arising out of the alleged sale of the securities to itself, but asks an order compelling one of the corporations to transfer to it some of the securities alleged to have been sold. Surely this is no case for equitable relief to the Federal Deposit Insurance Corporation. The collateral was collateral for an obligation which was accompanied by the agreement in question, which agreement they elected to respect for more than two years after they took over the assets, including Alker's note and collateral, and from which time there could be no question as to their knowledge of the agreement. During that time they billed and received interest monthly at the rate of five per cent per annum. They held the $125,000. insurance policies on the life of Alker in their favor and regularly checked to see if the premiums (amounting to between $4,000. and $5,000. per annum) had been paid. Any equities here should be with the petitioners who acted in the best of faith and scrupulously lived up to their agreement.

Petitioners submit that here there has been a misapplication to this case by the Circuit Court of Appeals for the Third Circuit of the *D'Oench, Duhme* decision; that there is a matter of federal policy involved here; and, if the present decision of the Circuit Court of Appeals for the Third Circuit is permitted to stand, irreparable damage will result to your petitioners; gross inequity will be done to your petitioners in an equity proceeding; and great confusion will exist as to the effect of the *D'Oench, Duhme* decision.

Because thereof your petitioners with all earnestness beg the matter be reconsidered by a full court and that a re-hearing be granted.

The undersigned, the counsel of record for the petitioners, certify that this petition for a re-hearing is presented in good faith and not for the purposes of delay.

Respectfully submitted,

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